Supreme Court, U.S
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No. 93-164

In The

Supreme Court of the United States

October Term, 1993

GEOPHYSICAL SYSTEMS CORPORATION,

Petitioner,

v.

RAYTHEON COMPANY and
SEISMOGRAPH SERVICE CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner's mere disagreement with the United States Court of Appeals for the Ninth Circuit's interpretations of California and Oklahoma law justifies the extraordinary remedy of the grant of a writ of certiorari?

PARTIES TO THE PROCEEDING

Pursuant to Rule 29.1 of the Rules of the Supreme Court of the United States, Respondent Seismograph Service Corporation states that its parent company is Respondent Raytheon Company.

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STATEMENT OF THE CASE

Respondent Seismograph Service Corporation ("SSC") agrees with Petitioner Geophysical Systems Corporation's ("GSC") statement: "On one level, this case is a routine breach of contract claim litigated in the district court under diversity of citizenship jurisdiction." Petition for Writ of Certiorari at 3. SSC disagrees with GSC's contention that at some "other level" this case raises significant issues of federalism and federal court interpretation of state law.

Erie R. Co. v. Tomkins, 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817 (1938), mandates that a federal court sitting in diversity apply the substantive law of the forum state. *Salve Regina College v. Russell*, 499 U.S. 225, 113 L.Ed.2d 190, 111 S.Ct. 1217 (1991), mandates a *de novo* review of a trial court's determination of state law. In the present case, after reviewing briefs in excess of 250 pages, the Ninth Circuit properly conducted a *de novo* review of the trial court's determination of state law and properly applied the substantive law of California. Despite GSC's strained effort to state otherwise, this case is nothing more than "a routine breach of contract claim litigated in the district court under diversity of citizenship jurisdiction." Accordingly, it does not justify further review by this Court.

I. THE BACKGROUND

Before 1990, GSC, operating as a research and development company, developed the GEOCOR IV, a new but unusual system for acquiring seismic data. (Tr. 5/9/90 at 2053-55). To support its research, GSC operated a small

number of GEOCOR IV systems with its own employees, contracting with oil companies to perform seismic exploration.

In 1980, GSC changed the nature of its business. GSC made a public offering of its stock and borrowed large amounts of money. (Tr. Ex. 603). In a short time period, GSC began manufacturing and selling GEOCOR IVs to third parties, expanded the number of its own seismic exploration crews, and entered the seismic data processing business (including processing seismic data collected by others).

In the fall of 1980, GSC agreed to purchase SSC computer hardware and software for use in GSC's planned data processing centers. Beginning in December 1980, SSC delivered fourteen computer systems to four GSC data processing centers under two written contracts. After an initial start up period, the computer systems operated and processed GSC's seismic data.

Ultimately, GSC's new business ventures failed. The industry distrusted the GEOCOR IV because of its unusual approach to data acquisition. (Tr. 5/9/90 at 2053-55) GSC had problems manufacturing GEOCOR IVs, especially the array terminals necessary for the acquisition of seismic data. (Tr. 11/18/88 at 4-8, 10-12; 5/9/90 at 2082-83; Ex. 8302) GSC had problems with data acquisition and processing totally unrelated to SSC-supplied hardware and software. (5/4/90 at 1942-48; 11/18/88 at 14-15; Ex. 8063) GSC was unable to hire experienced employees to operate its new computer equipment or to analyze its seismic data.

In early 1982, the price of oil dropped and seismic exploration activity fell off. (Tr. 11/18/88 at 29-30; Ex. 27) GSC was highly leveraged. There was no market for GEOCOR IVs. There was no work for GSC's seismic exploration crews. In December 1982, GSC agreed to a schedule to return equipment to SSC and pay a portion of the amounts that GSC owed to SSC. GSC breached this agreement. In February 1983, GSC returned all SSC-supplied hardware and software to SSC. In March 1983, GSC filed for protection under Chapter 11 of the Bankruptcy Code. Three years later, GSC filed its action against SSC, opting to do so in federal district court rather than the state courts of California or Oklahoma.

II. THE TRIALS

The trial court conducted two lengthy jury trials. The first trial began in November 1988 and lasted two months. At the close of GSC's evidence, the trial court directed verdicts for SSC (1) on GSC's fraud and negligent misrepresentation claims (on the grounds that Oklahoma's two-year statute of limitations barred these claims) and (2) on all of GSC's claims under the second of GSC's contracts with SSC (on the grounds that a two-year limitation provision in that contract barred these claims). At the close of all the evidence, the trial court directed a verdict for SSC on GSC's breach of contract claims under the first of GSC's contracts with SSC (on the grounds that California's four-year statute of limitations barred these claims). The jury returned a general verdict awarding GSC damages of $48,302,515 on GSC's remaining claims.

Immediately after the first trial, SSC moved for JNOV or a new trial on all issues. The trial court granted SSC's Motion for JNOV on GSC's unfair competition claim (on the grounds that GSC failed to prove (a) competitive injury or injury to the public and (b) a pattern of unfair business practices). In addition, the trial court granted SSC a new trial on damages (on the grounds that the jury's damage award was grossly excessive, contrary to the great weight of the evidence, and probably infected by prejudice).

GSC moved the trial court to reconsider its decision to grant JNOV on GSC's unfair competition claim. In response to GSC's motion, the trial court vacated its order granting JNOV on GSC's unfair competition claim and reserved ruling on SSC's motions for JNOV or a new trial on that claim until after retrial of the damage portion of GSC's warranty and implied covenant claims.

SSC subsequently moved the trial court to reconsider its ruling on GSC's contract-related claims and order a new trial on liability as well as damages. SSC contended that *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988), and cases interpreting *Foley*, indicated that the trial court erred in giving a discovery rule instruction in connection with GSC's implied covenant claim. The trial court agreed with SSC and ordered a new trial on liability as well as damages.

The second trial began on April 17, 1990. Like the first trial, it lasted two months. The second jury returned a verdict for SSC.

After the second trial, the trial court denied SSC's motion (pending since the end of the first trial) for JNOV

or a new trial on GSC's unfair competition claim under Cal. Bus. & Prof. Code § 17200 *et seq.*

III. THE APPEAL

The parties each appealed the judgments against them. The United States Court of Appeals for the Ninth Circuit affirmed the judgment in favor of SSC and against GSC based on the verdict in the second trial. In addition, the Ninth Circuit reversed the judgment in favor of GSC and against SSC on GSC's claim under Cal. Bus. & Prof. Code § 17200 *et seq.* The Ninth Circuit subsequently denied GSC's Petition for rehearing and rejected its suggestion for rehearing *en banc.*

The Ninth Circuit applied California law. The Ninth Circuit applied the proper standard of review to the trial court's determination of California law. Nothing in the Ninth Circuit's opinion is contrary to binding California precedent. The result the Ninth Circuit reached is the same result that would have been reached in a California court or in any other court applying California law to the facts of this case.

SUMMARY OF THE ARGUMENT

GSC's disagreement with the decision of the United States Court of Appeals for the Ninth Circuit in this matter is merely a disagreement with the Ninth Circuit's *de novo* interpretations of California and Oklahoma law. This case presents no issue justifying the extraordinary remedy of the grant of a writ of certiorari.

ARGUMENT

I. This Case Does Not Present Any "Special And Important Reason" Justifying The Extraordinary Remedy Of The Grant Of A Writ Of Certiorari.

Rule 10.1 of the Rules of the Supreme Court of the United States provides that "certiorari will be granted only when there are special and important reasons therefor." GSC contends (a) that the decision of the Ninth Circuit Court of Appeals in this case conflicts with decisions of the Third and Seventh Circuit Courts of Appeals and (b) that the Ninth Circuit's decision departs from decisions of the California and Oklahoma appellate courts. GSC endeavors mightily to convince this Court that this is a case worthy of certiorari. The plain truth is that the only real dispute in this matter is whether GSC's or SSC's interpretation of California and Oklahoma law is correct. The Ninth Circuit conducted *de novo* review of state law issues and agreed with SSC's (and the trial court's) interpretation of state law. *See Salve Regina College v. Russell*, 499 U.S. 225 (1991). GSC's Petition invites this Court to conduct its own *de novo* analysis of state law and to concur with GSC's position. However, assuming *arguendo* that some error of interpretation was made in this case, this Court does not sit to correct mere errors of interpretation of state law.[1]

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[1] The Ninth Circuit's decision in this case is no more than an application of the familiar rule that, in the absence of authority directly on point from the state appellate courts or in the face of conflicting authority, a Court of Appeals must make its best prediction of what the Supreme Court of the state would decide if faced with the issue. *See, e.g., LaDue v. Chevron, U.S.A., Inc.,*

II. No Conflict Exists Between The Ninth Circuit's Decision In This Case And Decisions Of The Third And Seventh Circuits.

GSC strains to clothe its disagreement with the Ninth Circuit's interpretations of California and Oklahoma law in a format compatible with Rule 10.1(a) of the Rules of the Supreme Court.[2]

GSC first argues that the Ninth Circuit's approach based on the discernment of a "trend" in California law conflicts with the more "circumspect" approach of the Third and Seventh Circuits, citing *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611 (3d Cir. 1992), and *In re Air Crash Disaster Near Chicago, Illinois*, 771 F.2d 338 (7th Cir. 1985). Neither case, however, is analogous to this matter nor

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920 F.2d 272, 274 (5th Cir. 1991); *In re Kirkland*, 915 F.2d 1236, 1239 (9th Cir. 1990); *Mahne v. Ford Motor Co.*, 900 F.2d 83, 86 (6th Cir.), *cert. denied*, 498 U.S. 941, 112 L.Ed.2d 313, 111 S.Ct. 349 (1990); *Plummer v. Lederle Laboratories*, 819 F.2d 349, 355 (2d Cir.), *cert. denied*, 484 U.S. 898, 98 L.Ed.2d 191, 108 S. Ct. 232 (1987).

[2] "The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

Rule 10.1(a) of the Rules of the Supreme Court of the United States.

creates a clear "conflict" among circuits to mandate certiorari. In *Borse*, the Third Circuit refused to alter its prior decisions interpreting *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974), to provide a limited "public policy" exception to Pennsylvania's employment at-will doctrine for the discharge of an employee at will. *Borse*, 963 F.2d at 617. *Borse* held that, in the absence of any clear statement by the Supreme Court of Pennsylvania that no public policy exceptions existed and in light of decisions of the lower Pennsylvania appellate courts recognizing such exceptions, the district court erred in dismissing the plaintiff's complaint that asserted such an exception. *Id.* at 617, 626. In *Air Crash*, the Seventh Circuit declined to expand recovery under the Illinois Wrongful Death Act to allow an adult brother to recover damages for the loss of society of his adult sister in the absence of *any* suggestion from the Illinois appellate courts that such a recovery would be allowed. *Air Crash*, 771 F.2d at 339-340.[3]

There is no "conflict" between the decision of the Ninth Circuit in this case and the decisions of the Third Circuit in *Borse* or the Seventh Circuit in *Air Crash*. Each

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[3] In fact, one Illinois appellate court had held that such a recovery would not be allowed. *See Prendergast v. Cox*, 128 Ill.App. 3d 84, 88-89, 83 Ill. Dec. 279, 282, 470 N.E.2d 34, 37 (1st Dist. 1984). The pertinent Supreme Court of Illinois cases had extended recovery for loss of society under the Wrongful Death Act only to spouses and parents of deceased children. *See Elliott v. Willis*, 92 Ill.2d 530, 537-40, 65 Ill. Dec. 852, 856-57, 442 N.E.2d 163, 167-68 (1982); *Bullard v. Barnes*, 102 Ill.2d 505, 515, 82 Ill. Dec. 448, 453, 468 N.E.2d 1228, 1233 (1984).

case was appropriately decided on the facts and applicable law presented. Each was a proper judicial "prediction" of what the appropriate state court would decide if faced with the question presented. GSC's perception of how "circumspect" each appellate court may be in applying emerging state law is an inappropriate basis upon which to base a grant of certiorari.

III. GSC's Arguments That The Ninth Circuit "Departed" From Applicable State Law Are Without Merit.

In its second struggle to come within the terms of Rule 10.1(a) GSC argues that the Ninth Circuit "departed" from applicable state law by disregarding decisions of California courts and conducting inadequate analyses of state law issues.

A. THE NINTH CIRCUIT DID NOT ERR IN HOLDING THAT THE DISCOVERY RULE DID NOT APPLY TO GSC'S CLAIM UNDER CALIFORNIA STATE LAW FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

GSC argues that the Ninth Circuit erred in refusing to apply the discovery rule to GSC's claim under California state law for breach of the implied covenant of good faith.

The trial court and the Ninth Circuit agreed with SSC that the California Supreme Court decision in *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988) required reexamination of the decision of the California Court of Appeals in *April Enterprises, Inc. v.*

KTTV, 147 Cal. App. 3d 805, 195 Cal. Rptr. 421 (1983). *See* A11-13. *Foley* held that, absent a special relationship between the parties, claims based on the implied covenant of good faith and fair dealing are contract claims for which tort remedies are not available. *Foley*, 765 P.2d at 389-96. The trial court concluded that in light of *Foley* and cases following *Foley* GSC's claim for breach of the implied covenant of good faith and fair dealing was a contractual claim subject to Cal. Com. Code § 2725 (*See* A37) and the immediate accrual rule in § 2725. *See* A26. The Ninth Circuit agreed with this conclusion. *See* A12-23.

GSC argues that *April Enterprises*, which permitted application of the discovery rule to a claim of breach of the implied covenant of good faith, remains the controlling general rule of California law. GSC ignores the reality that *April Enterprises* merely created a narrow, fact-sensitive *exception* to the rule that common law breach of contract claims accrue at the time of breach.[4] GSC also

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[4] The *April Enterprises* court described its holding as follows:

> In this opinion, we do not adopt the broad Maryland view [that the discovery rule applies in all breach of contract actions]. Nor do we reject the general California rule that contract causes of action accrue at the date of injury. *But we do find the unusual facts of this case call for an exception to the general rule.* Specifically, we hold the discovery rule may be applied to breaches which can be, and are, committed in secret and, moreover, where the harm flowing from those breaches will not be reasonably discoverable by plaintiffs until a future time.

April Enterprises, Inc. v. KTTV, 147 Cal.App.3d at 832 (emphasis added).

ignores California authority contrary to its position. California Commercial Code § 2725 expressly states that "[a] cause of action [for a U.C.C.-governed claim] accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach."[5] *See* A37. Significantly, in a case that GSC fails to mention, a California appellate court cited *Foley* in refusing to apply the discovery rule to a good faith and fair dealing claim arising from a normal sales transaction. *See Krieger v. Nick Alexander Imports, Inc.*, 234 Cal. App. 3d 205, 285 Cal. Rptr. 717 (1991).

GSC argues that *Foley* should be limited to the employer/employee context. Once again, GSC ignores cases from the California courts extending the reasoning of *Foley* to other contexts. *See Krieger v. Nick Alexander Imports, Inc., supra* (citing *Foley* in the context of dispute between buyer and seller of automobile); *City and County of San Francisco v. Smith*, 275 Cal. Rptr. 17, 23-24 (Cal. Ct. App. 1990) (applying *Foley* in dispute between real estate developers and local land use regulators); *Price v. Wells Fargo Bank*, 213 Cal. App.3d 465, 261 Cal. Rptr. 735, 740-42 (1989) (applying *Foley* in lender/borrower context). Contrary to GSC's assertion that the California courts have not "perceived" any changes in the law by *Foley* (Petition for Writ of Certiorari at 3), the broad significance of *Foley* has indeed not escaped California state courts.

> The winds of change blew in 1988 with the publication of *Foley v. Interactive Data Corp.*, . . . A reconstituted Supreme Court

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[5] GSC does not dispute that the U.C.C. governs its contract-based claims.

> . . . took a completely new look at the "implied covenant of good faith and fair dealing." . . .
>
> There is no question but that the decision in *Foley* redirects the course of law in the area of tort recovery for breach of commercial contracts.

Copesky v. Superior Court of San Diego County, 229 Cal. App. 3d 678, 688-89, 280 Cal. Rptr. 338 (1991).

GSC also cites to *Prudential-LMI Commercial Insurance v. Superior Court*, 51 Cal.App.3d 674, 798 P.2d 1230, 274 Cal. Rptr. 387 (1990), as upholding its interpretation of *April Enterprises*. However, *Prudential-LMI* did not even discuss whether the discovery rule applies to the accrual of a cause of action for breach of the implied covenant of good faith and fair dealing. *Prudential-LMI* merely addresses the unrelated question of the delayed discovery of latent property damage with respect to the interpretation of the term "inception of the loss" in a fire insurance policy.

The decision of the Ninth Circuit and the trial court to refuse to apply the discovery rule to GSC's claim for breach of the implied covenant of good faith and fair dealing was correct. The Ninth Circuit's decision comports with existing California law and produces exactly the decision that would have been reached had GSC's claims been tried in state court. There is no need for this Court to make its own *de novo* interpretation of state law.

B. THE NINTH CIRCUIT DID NOT ERR IN HOLDING THAT GSC DID NOT MEET ITS BURDEN OF PROOF WITH RESPECT TO GSC'S CLAIM OF UNFAIR COMPETITION UNDER CALIFORNIA BUSINESS & PROFESSIONS CODE § 17200.

GSC disagrees with the Ninth Circuit's finding that GSC did not meet its burden of proof with respect to GSC's claim of unfair competition under California Business & Professions Code § 17200 in that GSC did not establish that it suffered a competitive injury or that injury to the consuming public had occurred. *See* A15-17. Specifically, the Ninth Circuit found that GSC had not shown any injury "beyond the risk of loss that any party entering into a contract to buy goods assumes." *See* A16. As noted by GSC, this case presents "a routine breach of contract claim." Petition for a Writ of Certiorari at 3. Simply stated, SSC sold computer equipment and software to GSC. GSC alleged that the equipment and software did not work. The core of GSC's case was its claim for breach of contract/breach of warranty between a buyer and a seller of goods. *See* A14. As the Ninth Circuit correctly concluded, GSC did not even create a jury question concerning the existence of unfair "competitive injury" or any injury to the consuming public.

The Ninth Circuit did not hold a plaintiff cannot prove an unfair competition claim in the context of a commercial, buyer-seller relationship. The Ninth Circuit merely held that GSC failed to prove the elements of an

unfair competition claim in the present case.[6] GSC is, in effect, inviting this Court to employ the extraordinary remedy of the grant of a writ of certiorari so that this Court can sift through the evidence from two trials to determine whether the Ninth Circuit properly concluded that there was insufficient evidence to send GSC's unfair competition claim to the jury. This Court should decline GSC's invitation.

C. THE NINTH CIRCUIT DID NOT ERR IN HOLDING THAT GSC'S FRAUD CLAIMS WERE GOVERNED BY OKLAHOMA'S TWO-YEAR STATUTE OF LIMITATIONS.

Finally, GSC disagrees with the Ninth Circuit's affirmance of the District Court's application of Oklahoma's two-year statute of limitations, rather than California's three-year statute, to GSC's fraud and misrepresentation claims. *See* A8-9. In accordance with *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 85 L.Ed. 1477, 61 S.Ct. 1020 (1941), the District Court and the Ninth Circuit applied the forum state California's choice of law rules. Both courts concluded that the Oklahoma statute of limitations applies.

GSC does not argue that the Ninth Circuit's decision is contrary to any precedent or statute. GSC does not contend that the Ninth Circuit disregarded the mandate of *Klaxon* or even that it failed to use the proper analytical

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[6] Thus, there is no conflict between the Ninth Circuit's decision in this case and *Allied Grape Growers v. Bronco Wine Co.*, 203 Cal. App. 3d 432, 249 Cal. Rptr. 872 (1988).

approach to choice of law issues under California law. Rather, GSC argues that, in the course of their procedurally and analytically proper analyses, the District Court and the Ninth Circuit gave *inadequate attention* to Oklahoma's "reverse borrowing statute" (12 Okla. Stat. § 105). *See* A36.[7]

The parties extensively and repeatedly briefed the choice of law issues in this case. Both the trial court and the Ninth Circuit were well aware of the existence of Oklahoma's unusual (but inapplicable) reverse borrowing statute. Both Courts nevertheless concluded that Oklahoma's statute of limitations controlled GSC's fraud and misrepresentation claims. GSC's complaint is nothing more than simple disagreement with the Ninth Circuit's conclusion. The issues raised by the Ninth Circuit's decision to apply Oklahoma's statute of limitations to GSC's claims for fraud and negligent misrepresentation are woefully inadequate to trigger the extraordinary remedy of the grant of a writ of certiorari under the standards set forth in the Rules of this Court. The "special and important reasons" called for by the Rules of this Court are simply not present.

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[7] GSC does not claim that the courts below should have applied Oklahoma's reverse borrowing statute. It is, in fact, inapplicable. *See Reinhard v. Textron, Inc.*, 516 P.2d 1325, 1327 (Okla. 1973).

CONCLUSION

WHEREFORE, Respondents Seismograph Service Corporation and Raytheon Company respectfully request the Court to deny Petitioner Geophysical Systems Corporation's Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX J

CALIFORNIA UNIFORM COMMERCIAL CODE § 2725

§ 2725. Breach of contract for sale; Limitation of actions; Accrual of action; Time for bringing second action; Retrospective operation of section

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

(3) Where an action commenced within the time limited by subdivision (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this code becomes effective.